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Issue Date: 30 January 2003

In The Matter of:

JOSEPH AMBROSE,
Claimant

Case No.: 2001-LHC-0211
OWCP No.: 4-33312

v.

BETHLEHEM STEEL CORP. ,
Employer/Self-Insurer

Appearances:

Michael C. Eisentein, Esq.
Baltimore, Maryland
For the Claimant

Heather Kraus, Esq.
Semmes, Bowen, and Semmes
Baltimore, Maryland
For the Employer

John M. Strawn, Esq.
Office of the Solicitor
Philadelphia, Pennsylvania
For the Director

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by Joseph Ambrose ("Claimant") against Bethlehem Steel Corporation ("Employer"). The Act provides for payment of medical expenses and compensation for disability or death of an employee injured on navigable waters of the United States or adjoining areas. In this case, Ambrose alleges that he is permanently totally disabled, or, in the alternative, permanently partially disabled, by an April 4, 1996 accident.

I conducted a hearing on this claim on June 12, 2001, in Baltimore, Maryland. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant's Exhibits ("CX") 1-26 and Employer's Exhibits ("EX") 1-36 were admitted into evidence without objection. CX 27, an opinion by an Administrative Law Judge ("ALJ") in an unrelated case, was excluded. Transcript ("Tr.") at 9-10. The record was held open after the hearing to allow the Employer to submit the deposition of Dr. Apostolo and for the parties to submit closing arguments. As the Employer sought Special Fund relief, the Director of the Office of Workers' Compensation Programs ("Director," "OWCP") was also given leave to file a post-hearing brief. I hereby admit the deposition of Dr. Apostolo as EX 37. The parties and the Director submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing and the arguments of the parties.

STATEMENT OF THE CASE

Claimant was employed as a Shipfitter for the Employer for 23 years. He is seeking permanent total or permanent partial disability from the Employer for an injury that occurred on April 4, 1996, when some staging boards weighing 75-80 pounds fell and struck him.

In his first claim, heard on March 25, 1997, and decided by Judge Schreter-Murray on November 25, 1997, Ambrose sought temporary total disability benefits from April 4, 1996 forward, and past and future medical benefits for neck, shoulder and knee injuries.¹ Judge Schreter-Murray's decision appears in the record as EX 1. She found that as a result of the accident,

. . . Ambrose sustained soft tissue injuries in the nature of sprain of the cervical musculature, a right shoulder contusion and subsequent bursitis, due to a glancing blow to hard hat and right shoulder which were amenable to conservative treatment consisting of rest and anti-inflammatory medication . . . [R]ight knee complaints, due to the aging process are not temporally or otherwise related to the industrial incident. Ambrose sustains no current or residual impairment attributable to the industrial incident. . . .

Slip op. at 15. She did not accept the testimony of Dr. Friedler, an orthopedist who treated Ambrose, that Ambrose was unable to return to work without restrictions, and credited the

¹The complete record of proceedings before Judge Schreter-Murray is not before me, so I do not know precisely what evidence was introduced. I base my discussion of the prior proceedings in the Claimant's case on the decisions by the ALJ's and the Benefits Review Board, introduced into the record by the Employer. It appears, however, that most of the evidence in the record before me was also before Judge Schreter-Murray.

testimony of Dr. Apostolo, who examined Ambrose for the Employer, that problems with Ambrose's right knee were unrelated to the April 4, 1996 accident, and that Ambrose could have returned to work without restrictions by the time of his October 30, 1996 examination. She concluded that the Employer was not responsible for medical treatment by Dr. Friedler, whose treatment (including surgery on Ambrose's shoulder) was not reasonable or necessary or authorized by the Employer, or any medical treatment other than that provided by Dr. Bailey, which the Employer had paid. She also found that Ambrose was not entitled to compensation after April 5, 1996, when he failed to participate in the restricted duty offered by the Employer and was discharged for cause pursuant to the collective bargaining agreement. His claim for past and future medical benefits and compensation was denied. Slip op. at 16.

The Benefits Review Board ("BRB" or the "Board") affirmed Judge Schreter-Murray's findings that the Employer was not liable for Dr. Friedler's treatment and that Ambrose's knee condition was not causally related to the work injury. The Board vacated the denial of disability benefits, and remanded the case to consider whether the claimant was capable of performing the restricted duty job offered by the Employer one day after the injury. In so ruling, the Board left undisturbed but did not specifically address Judge Schreter-Murray's other findings on the nature and extent of the disability and the lack of any residual impairment attributable to the April 1996 incident after October 1996. EX 2. On remand, Judge Holmes denied the Claimant's request to reopen the record for additional testimony, and addressed only the period between April and October 1996. Slip op. at 3, EX 3. He concluded that Ambrose could have performed the restricted duty, and again denied compensation benefits, a finding which was affirmed by the Board on June 23, 2000. EX 4.

On September 11, 2000, Claimant filed a second claim seeking permanent total or permanent partial disability benefits for injuries to his neck and shoulder that occurred on April 4, 1996. *See* Claimant's LS-18. The case was transferred to the Office of Administrative Law Judges for hearing. On May 16, 2001, the Employer filed a Preliminary Motion and Memorandum of Law seeking to dismiss the claim. Employer contends that the Claimant is not entitled to any permanent partial or permanent total disability benefits because the claim was litigated before Judge Schreter-Murray and, in accordance with the law of the case, Claimant did not sustain any residual impairments. On June 5, 2001, Claimant filed a response to Employer's motion arguing that this claim is not barred because the issues of permanent partial and permanent total disability were not previously addressed by any tribunal. I took the motion under advisement and conducted the hearing. At the hearing, counsel for the Claimant stated that he is not seeking modification of the denial of his previous claim. Tr. at 6-7. In his post-hearing brief, counsel argued that the Claimant is not precluded from raising issues of permanent total or partial disability, that the Claimant cannot return to his prior work, and that the aggravation rule may apply. Counsel for the Employer argued that the claim is precluded, that the Claimant has no residual disability as a result of the April 1996 incident, and that if the Claimant is found to have permanent disability as a result of the incident, the Employer is entitled to Section 8(f) relief.

ISSUES

1. Under the Law of the Case doctrine, is Claimant precluded from bringing a claim for permanent total or permanent partial disability where, in a previous hearing, it was found that he had no residual impairment?
2. If the claim for permanent disability benefits is not barred, is the Claimant permanently partially or totally disabled as a result of the April 4, 1996 injury?
3. If the Claimant is permanently partially or totally disabled as a result of the April 4, 1996 injury, is the Employer is entitled to Section 8(f) relief?

Tr. at 5-6; post hearing briefs. For the reasons explained below, I conclude that the claim is not barred by the law of the case doctrine. I also conclude, however, that the Claimant is not disabled as a result of the April 4, 1996 injury. Thus I need not reach the Section 8(f) issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Law of the Case Doctrine

“Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.” 1B *Moore’s Federal Practice* § 0.404 [1] (2d ed. 1980). The United States Supreme Court has found that the doctrine is a rule of practice based on a policy that when an issue is once litigated, that should be the end of the matter. See *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh’g denied*, 339 U.S. 972 (1950). It requires an administrative agency to conform its proceedings in the case to the principles set forth in the prior judicial decision, unless there is a change to the underlying facts, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. See *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998); *Weber v. S.C. Loveland Company*, 2001 W.L. 618456 at *3, 35 BRBS 75 (2001). In Ambrose’s case, for example, in its second decision, the BRB held that its prior holding that Ambrose knew he had been offered light duty work by April 5, 1996 was the law of the case, precluding a second challenge on that point. EX 4 at 3.

The determination that Ambrose had no residual impairment was central to Judge Schreter-Murray’s denial of medical benefits, and thus, in an appropriate situation, might be considered to be the law of the case. Nonetheless, in the context of this claim, application of the doctrine is problematical both because of the fluid nature of the concept of disability in workers’ compensation law, and because the current claim was filed less than one year after final rejection of Ambrose’s initial claim by the BRB. The LHWCA categorizes disability fluidly. It conceives disabilities in a medical, as well as an economic sense. A single injury may give rise to several disabilities and a claimant’s disability may shift from one category to another depending on

changes in the claimant's health conditions or the relevant labor market. *See* 33 U.S.C. § 902(10); *Pool Co. v. Cooper*, 274 F.3d 173, 183 (5th Cir. 2001). Furthermore, Section 22 of the Act allows any party to request modification of an award within one year of payment of compensation or rejection of a claim because of mistake of fact or a change in condition. 33 U.S.C. § 922. Traditional notions of res judicata do not govern Section 22 modification proceedings. *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222 (1st Cir. 2001). Facts relating to the nature and extent of a claimant's disability have been deemed a proper subject of modification proceedings. *See, e.g., Allen v. Strachan Shipping Co.*, 11 BRBS 864 (1980); *Steele v. Associated Banning Co.*, 7 BRBS 501 (1978).

When asked at the hearing, counsel for Ambrose denied that he was seeking modification, apparently because he viewed a claim for permanent disability as being a separate claim from one seeking temporary disability. *See* Tr. at 6-7; Claimant's Response to Preliminary Motion; and Claimant's post-hearing brief. I conclude that counsel is mistaken in that view. *See Pool Co.*, 274 F.3d at 183-184 (holding that for purposes of withdrawal of a claim pursuant to 20 CFR § 702.225, the term "claim" does not refer to a category of temporary or permanent, but rather holistically to any claim for compensation for a single injury arising out of a single incident). It is irrelevant for purposes of Section 22 whether this action was labeled as a request for modification, or a claim for compensation, "so long as the action in fact comes within the scope of the section." *Banks v. Chicago Grain Trimmers Assn., Inc.* 390 U.S. 459, 465 n. 8 (1968). I will therefore treat this claim as a request for modification of the prior decision rejecting Ambrose's claim.

Counsel for the Employer alleged that the Claimant reached maximum medical improvement by October 30, 1996, based on an examination by Dr. Apostolo of that date. Tr. at 5. Counsel for the Claimant took the position that Ambrose reached maximum medical improvement by January 3, 1997, the date of an examination by Dr. Friedler. Tr. at 5; *see* CX 3. Both of these dates had passed before the hearing before Judge Schreter-Murray in March 1997. In his briefs, counsel for the Claimant specified alleged errors made in the prior decision, but did not argue that circumstances had changed. The thrust of his arguments is that Judge Schreter-Murray erred when she credited Dr. Apostolo's evidence over Dr. Friedler's, and that I should find Ambrose permanently disabled by a neck and shoulder injury in April 1996 which aggravated a prior condition. Absent any support for a claim of a change in circumstances to be gleaned from the evidence or the arguments of counsel, I will construe the claim as alleging that a mistake of fact was made in the determination that Ambrose had no residual impairment caused by the April 1996 incident. While new evidence would be required to show a change in condition, a mistake of fact may be demonstrated by "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1972).

II. Summary of the Evidence

A. Stipulations

The parties were able to reach the following Stipulations:

- I. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*
- II. An employer-employee relationship existed.
- III. On April 4, 1996, the Claimant sustained an injury that arose out of and in the course of his employment.
- IV. A timely notice of the injury was given by the Claimant to the Employer.
- V. The Employer filed a timely notice of controversion.
- VI. The average weekly wage at the time of injury was \$419.62.

Tr. at 5.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. *See* 20 CFR § 18.51; *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

B. Claimant's Testimony

On direct examination, Claimant testified that he is 59-years old and is married. He has a 9th grade education level and is able to read and write with some difficulty. Claimant obtained his GED in the 1970's and was employed as a Shipfitter by the Employer for 23 years. Prior to working with the Employer, Claimant was employed as a Iron Worker for approximately 20 years. Claimant's last date of employment with the Employer was on April 4, 1996, when several staging boards fell on him. Prior to the incident in April 1996, Claimant's only break in service from the Employer was in December 1990 through January 1995 due to layoffs. During that time, Claimant was employed as an Iron Worker for Baldwin Steel and WTM. Claimant worked for the Employer from January 1995 until the date of the incident. He stated that he never received vocational rehabilitation and that he did not return to work for the Employer because

the Employer sold the ship yard in 1997. Claimant is currently receiving Social Security Disability benefits, which were awarded in December 1996. *See* CX 25.

As to the accident on April 4, 1996, Claimant testified that he was working in the shaft dowsy. Above the Claimant's head was a rigger that was attempting to place two cumber longs. In its attempt to place the cumber longs, seven or eight staging boards, weighing approximately 75 to 80 pounds, fell onto the right side of Claimant's head and shoulder, which caused him to fall on his right knee. After the incident, Claimant went to Bayview Hospital and was examined by Dr. Bailey and subsequently Dr. Friedler. Dr. Friedler began treatment on the Claimant a week after the incident until November 1999. Under Dr. Friedler's care, Claimant underwent a rotator cuff tear surgery in July 1996. Claimant testified that Dr. Friedler instructed him not to work at the ship yard or as an iron worker. Claimant was also examined by Dr. Apostolo at the Employer's request. Claimant was examined approximately three times, with each examination lasting about ten minutes.

Claimant testified that he has sustained prior injuries before April 4, 1996. In 1973, Claimant incurred a neck injury that required two surgeries, which was performed by Dr. Friedler. As a result of this injury, Claimant was out of work for approximately two and a half years and received a permanent partial disability award of \$2,500.00 and \$1,333.00 per week for life. Subsequently, this case settled and the Claimant received approximately \$8,000.00 to \$9,000.00. *See* EX 6. In 1980, Claimant incurred an injury to his left thumb while employed by Bethlehem Steel. He lacerated his left thumb and received approximately \$800.00 for this injury. Around 1991 or 1992, Claimant injured his left knee while employed at Baldwin Steel and injured his left wrist while employed at WTM. These claims were consolidated as both companies had the same insurer and Claimant received a settlement. *See* EX 27. Also in 1991, Claimant incurred a hearing loss injury and filed a claim against Bethlehem Steel. Claimant received approximately \$13,000.00 for this claim. In 1992, Claimant was involved in a car accident that resulted in a head and neck injury. Claimant received approximately \$8,000.00 to \$9,000.00 for this injury.

Despite Claimant's numerous injuries, Claimant stated that he was never placed on work restrictions while employed with Bethlehem Steel. Claimant stated that he did not experience any major medical problems while employed with the Employer, however, he did experienced mild discomfort in his neck due to his previous surgeries. Claimant stated that he does not believe that he would be able to work as a shipfitter or iron worker any longer because he still experiences pain in his neck, shoulder and right knee. Claimant stated that he is unable to turn his head to certain distances and that he no longer has the strength that is required of a shipfitter or iron worker.

On cross examination, Claimant testified to several injuries that were not included in his direct testimony. Claimant testified that, along with his neck injury in 1973, he also incurred an injury to his right shoulder. For that incident, Claimant was found to have a \$20 per week loss of wage earning capacity. In 1987, Claimant was involved in another automobile accident where he also injured his neck. With regard to the left knee and wrist injuries in 1991, Claimant testified

that he received surgery on the left knee as a result of his accident at Baldwin Steel. Finally, Claimant testified that in 1995 he sustained an injury to his back while employed for Terry Acoustics. Claimant, however, stated that he does not remember whether he received an award for this injury. The Employer introduced a copy of his award for temporary and permanent partial disability to his back from the Maryland Workers' Compensation Commission as EX 26. Ambrose said he was last treated for problems with his neck and shoulder in January 1997. He last saw Dr. Friedler in November 1999 for a check-up related to his Social Security disability.

C. Medical Evidence

The medical evidence in the record includes treatment records and reports regarding Ambrose's condition from 1975 to 1999. The only new medical information generated after the March 1997 hearing before Judge Schreter-Murray include a November 9, 1999 examination report by Dr. Friedler, CX 2; a July 21, 2000 examination report by Dr. Apostolo, EX 7; and a deposition of Dr. Apostolo taken June 20, 2001, EX 37. It appears that the earlier depositions of Dr. Friedler, taken March 3, 1997, CX 26, and of Dr. Apostolo, taken March 4, 1997, EX 24, were in the record before Judge Schreter-Murray. Both Dr. Friedler and Dr. Apostolo are Board Certified orthopedic surgeons. CX 1; EX 9.

Ambrose incurred a neck injury in 1975 which exacerbated a pre-existing cervical spondylosis. Thereafter he underwent cervical fusion at three levels, with surgery in 1975 and 1977. The surgery was performed by Dr. Friedler and Dr. Aronson. He returned to work and was awarded a permanent partial disability to his neck. *Ambrose v. Bethlehem Steel Corp.*, ALJ No. 81-LHC-318 (ALJ Nov. 5, 1981), EX 5. Subsequently Ambrose returned to Dr. Friedler and Dr. Aronson for treatment of his neck due to automobile accidents in 1987 and 1991. Dr. Friedler discharged Claimant in January 1993 and did not see or treat Claimant again until April 1996. *See* CX 23, 24, 26; EX 28, 29, 30, 31, 32, 33, 34, 35, 36. The parties did not submit treatment records for his other work-related injuries, which are essentially unrelated to his current claim.

The accident at issue took place on April 4, 1996. Ambrose was seen that day in the emergency room of the Johns Hopkins Bayview Medical Center. Much of the emergency room report submitted by the Employer is illegible. I can make out only the second of the two lines regarding his diagnosis, "shoulder contusion," and the first of three parts of the instructions to the patient, "(1) Ice pack to affected areas. . . ." EX 18.

Dr. Rodolfo Dollete examined Claimant at Eastern Industrial Medical Center on April 5, 1996. Claimant complained of a headache and pain in his neck and shoulder. Upon examination, Dr. Dollete that Claimant was not in distress, however, was guarded in movements of his neck to the right side. There was pain on the base of the right side of the neck, the upper right scapular region, and also the AC joint of the right shoulder. Dr. Dollete diagnosed the Claimant with a contusion, sprain of the right side of neck and of the right shoulder. He advised the Claimant to obtain Myoflex and applied a neck collar on Claimant. Dr. Dollete stated that Claimant was able

to do modified work at his employment, with the restriction of no climbing ladders. He recommended that the Claimant do sedentary type work. EX 16.

Dr. Purcell Bailey, Jr., also examined Claimant on April 5, 1996. Claimant complained of pain in his head, neck and right shoulder. Claimant reported a history of cervical fusion twenty years ago and had been asymptomatic with regard to his neck. Claimant did not report any known allergies or other medical problems. Dr. Bailey reviewed Claimant's past medical history and opined that Claimant had a skull contusion with posttraumatic headaches, cervical sprain with history of cervical fusion, and a right shoulder injury. He recommended that Claimant use a heating pad and prescribed Flexeril. Dr. Bailey also prescribed physical therapy to the cervical spine and right shoulder five times per week. EX 17.

On April 12, 1996, Dr. Stanley Friedler examined Claimant for the injuries that were incurred on April 4, 1996. Claimant's chief complaints were pain in the neck and upper shoulder, as well as headaches. Dr. Friedler reviewed the medical records taken in the emergency room at Bayview Medical Center and noted that x-rays taken of Claimant's neck revealed fusions at three levels. He also noted that x-rays taken of Claimant's shoulder did not yield evidence of a fracture, however, it did show some mild degenerative changes. Additionally, x-rays taken of Claimant's low back revealed that there was some wedging at the L1 vertebra of long standing duration and that there were degenerative changes at the T12-L1 level. Dr. Friedler's impressions were prior anterior and posterior fusion C4-5, C5-6, and C6-7 with an acute exacerbation of symptoms secondary to trauma, contusion right shoulder with tendinitis, and possible lumbrosacral strain. He prescribed Daypro and physical therapy for Claimant's neck with hot packs and massage, in addition to a right shoulder ultrasound and range of motion exercises. Dr. Friedler stated that Claimant was not able to work and that he was to use his soft collar. CX 15.

Dr. Albert Folgueras, a Board Certified Orthopedic Surgeon, examined the Claimant on May 1, 1996. His examination was limited to the musculoskeletal system. Claimant complained of severe neck pain, as well as pain in his right shoulder. Dr. Folgueras noted that the Claimant did not have any neurological symptoms of the upper extremities and no other symptoms or complaints. In reviewing Claimant's past medical history, Dr. Folgueras impressions were that Claimant sustained a contusion of the right side of the head and right shoulder. Additionally, Claimant had a history of anterior and posterior cervical fusions (C4-5, C5-6 and C6-7) and a fracture of the left wrist. Dr. Folgueras stated that the best treatment for Claimant was anti-inflammatory medicine. Moreover, Dr. Folgueras opined that Claimant could perform light duty work. EX 12, 13.

Dr. Edward Wenzlaff, a Board Certified Orthopedic Surgeon, examined Claimant on May 2, 1996. Claimant complained of pain in his neck, head and right shoulder. Upon examination, Dr. Wenzlaff stated that there were scars on the back of Claimant's neck from previous surgeries, however, there was no definite spasms or bruising. In regards to the right shoulder, Dr. Wenzlaff noted that his shoulders appeared to move well on internal and external rotation. Claimant, however, winced when 90 degrees is approached in flexion or abduction. Dr. Wenzlaff diagnosed

the Claimant with status post contusions. However, there were no objective evidence of residuals. He stated that he had no objections to Claimant returning to his place of employment for sedentary type work. EX 14,15.

Dr. Friedler examined Claimant on May 8, 1996 and noted that the Claimant was still having pain in the neck, some pain in the shoulder, and clicking in the right knee. Upon physical examination, Dr. Friedler stated that Claimant seemed uncomfortable. An examination of the cervical spine revealed scars anteriorly and posteriorly. There were spasms to palpations of the paracervical muscle and the right trapezius muscle. He stated that Claimant had restricted motion with very limited extension. An examination of the shoulders revealed full motion on the left without pain, however, there was a pulling in the base of the neck with abduction. On the right, there were intermittent crepitation with movement. Dr. Friedler's impressions were prior anterior and posterior fusion C4-5, C5-6, and C6-7 with an acute exacerbation of symptoms secondary to trauma, contusion right shoulder with tendinitis and possibly a rotator cuff tear, and contusion right knee, degenerative arthritis. He recommended that Claimant have an MRI on the right shoulder and that he not work in his usual employment. He stated that Claimant could work in an office environment instead. CX 14.

On May 20, 1996, Dr. Amile Korangy conducted an MRI on Claimant's right shoulder. He found that the bones had a normal signal intensity. He stated that there was evidence of osteoarthritic changes at the AC joints and second degree impingement at the AC joints. He also stated that there was minimal increased signal intensity at the rotator cuff consistent with partial tear and some degenerative changes. Dr. Korangy concluded that the Claimant had a partial tear involving the rotator cuff and some degenerative changes and second degree impingement at the AC joints and osteoarthritic changes at the AC joints. CX 18.

In an Addendum dated May 21, 1996, Dr. Friedler noted that an MRI of Claimant's right shoulder was conducted on May 20, 1996. He stated that there was no evidence of a fracture. However, the MRI revealed degenerative changes at the acromioclavicular joint and there was some impingement. He stated that there was some increased signal in the rotator cuff consistent with tendinitis and degenerative change, or possibly a partial tear. CX 13.

On May 22, 1996, Dr. Friedler again examined the Claimant. He stated that the Claimant complained of severe pain in the right shoulder and the right side of his neck. Claimant also complained of clicking in the right knee. Dr. Friedler noted that the MRI of May 20, 1996 revealed a second degree impingement at the AC joint with osteoarthritic changes. He stated that there appeared to be tendinitis, as well as a partial tear of the rotator cuff on the right. Dr. Friedler treated Claimant with 10 mg of Kenalog and 2 mg of Decadron. He recommended that Claimant continue exercising his right shoulder and try to regain motion in his neck. He stated that Claimant was only able to work in an office type position and recommended a three dimensional CT scan of Claimant's neck to ensure that there was no fracture through the fusion mass. CX 12.

On May 23, 1996, a CT scan was conducted on Claimant's neck. In his notes dated May 30, 1996, Dr. Friedler noted that the fusions were intact and there was no evidence of a fracture or disc herniation. Although the various tests on Claimant's neck had not indicated a problem, Dr. Friedler stated that he was not surprised by Claimant's complaints. He stated that it is not unusual for a person, who has undergone several surgeries along with a significant incident of trauma, to experience problems with that area. He also stated that Ambrose demonstrated tendinitis, degeneration, and impingement in the right shoulder and a possible partial tear of the rotator cuff. CX 11.

On June 4, 1996, Dr. Neal Aronson examined Claimant for the injuries incurred on April 4, 1996. In his report, he stated that Claimant's cervical mobility was reduced with right posterolateral neck pain. Claimant's reflexes were diminished. Claimant experienced pain in the right shoulder upon manipulation and his mobility was reduced in all planes, without crepitation. Dr. Aronson stated that he suspected that the Claimant has sustained disc trauma at the level above his prior fusion. He deferred further advice until the results of further studies were taken. CX 19.

Claimant was referred to Dr. Martin Kanner by Dr. Aronson for electro diagnostic studies. Dr. Kanner examined Claimant on June 4, 1996. Upon examination, Dr. Kanner noted that Claimant complained of pain almost immediately on attempted right neck extension. He also noted that Claimant's right shoulder sat lower than the left. Dr. Kanner's impressions were that there was right median sensory nerve compression at the wrist, compatible with right carpal tunnel syndrome of a very mild degree. He stated that there was no evidence of retrograde slowing in the forearm nor was there evidence of denervation of the right abductor pollicis brevis muscle. He stated that the studies did not suggest cervical radiculopathy, brachial plexopathy, ulnar neuropathy, or peripheral nerve entrapment syndrome. CX 22; EX 11.

In an Addendum to the May 22nd evaluation, Dr. Friedler noted that Claimant had been sent to Dr. Kanner for EMG and nerve conduction studies. Dr. Friedler attributed Dr. Kanner's findings to local trauma to Claimant's neck and the right shoulder. He stated that the studies did not suggest a cervical radiculopathy, brachioplexopathy, ulnar neuropathy or peripheral nerve entrapment. He also stated that the Claimant might benefit from a decompression of the right shoulder.

Claimant was referred to Dr. Robert Van Besein by Dr. Aronson. On June 8, 1996, Dr. Van Besein examined Claimant for complaints of neck pain. He conducted a magnetic resonance imaging of the cervical spine. Dr. Van Besein's impressions were: status post interbody fusion C4-5 through C6-7; no evidence of disc herniation; and spondylosis at C2-3, C3-4, C7-T1 and T2. He also stated that there was no evidence of cord compression and there was slight narrowing of the C3-4 neural foramen bilaterally. CX 21; EX 10.

In a letter dated June 10, 1996, Dr. Aronson reviewed the MRI conducted by Dr. Van Besein. He stated that the MRI did not shed any light on Claimant's right posterolateral neck and

shoulder pain. Dr. Aronson stated that he believed that Claimant's pain is a result of a local injury to the extra-spinal structure rather than anything in the cervical spine. He noted that Claimant had evidence on his nerve conductions of a mild carpal tunnel condition on the right side, which did not correlate with any of Claimant's clinical complaints. CX 20; EX 21.

On June 12, 1996, Dr. Friedler examined Claimant and noted that the Claimant is still having pain in the neck, the right side of his head and neck and into his right shoulder. Dr. Friedler stated that, although Claimant was still bothered with his right knee, Claimant's real disability was his neck and shoulder. The three dimensional CT scan revealed that the fusions at the C4-5, C5-6, and C6-7 levels were solid. Upon physical examination, Claimant seemed uncomfortable and moved his head and neck stiffly. Dr. Friedler stated that the Claimant would like surgical intervention on his right shoulder and that arrangements would be made at Sinai Hospital. CX 9.

The surgery took place on July 30, 1996. According to the operative report, Ambrose had a tear in the bursa, but no tear in the rotator cuff. CX 17; EX 20.

On August 6, 1996, Claimant was evaluated by Dr. Friedler. In his notes, Dr. Friedler stated that the Claimant was found to have a rotator cuff tear in his right shoulder and needed to have a decompression along with removal of bursa and release of coracoacromial ligament. Claimant still reported pain in his neck and right shoulder. However, Claimant stated that the pain in his right shoulder had improved a little since the surgery. Dr. Friedler prescribed physical therapy and stated that Claimant was unable to work. CX 8.

Approximately five weeks post decompression of the right shoulder, Dr. Friedler examined Claimant. In his notes dated September 3, 1996, Dr. Friedler stated that Claimant had a repair of a torn rotator cuff, removal of a bursa and release of the coracoacromial ligament. Dr. Friedler stated that Claimant continued to show improvement and that the pain in his shoulder and neck have eased. Upon physical examination, Dr. Friedler noted that Claimant looked more comfortable. He recommended that Claimant discontinue the use of an immobilizer and that he continue with physical therapy. Also, Dr. Friedler recommended that Claimant does not do any heavy lifting, pushing, or pulling. He stated that Claimant should be working in an office type position. CX 7.

On September 24, 1996, Dr. Friedler examined Claimant and expressed a concern that Claimant may have a torn medial meniscus in his right knee. In an addendum to this evaluation, Dr. Friedler noted that an MRI was conducted on Claimant's knee. In reviewing the MRI, Dr. Friedler stated that Claimant had an effusion in the knee and degenerative changes in the lateral meniscus with some narrowing. However, he did not see evidence of a definite tear. CX 6.

In his October 14, 1996 report, Dr. Friedler stated that the Claimant still complained of some discomfort in his right shoulder and neck. According to Claimant, the condition of his neck was worse than it had been prior to the incident of April 4, 1996. Upon physical examination, Dr.

Friedler reported that Claimant seemed uncomfortable when he first got ambulatory. Dr. Friedler's impressions were post repair torn right rotator cuff with decompression right shoulder release of coracoacromial ligament and acromioplasty, prior anterior and posterior cervical fusion C4-5, C5-6, and C6-7, contusion right knee degenerative arthritis, consider torn medial meniscus. Dr. Friedler stated that the Claimant's right shoulder and neck were doing reasonably well. However, Claimant's right knee continued to be symptomatic. Dr. Friedler also stated that Claimant could work in a sedentary position. He did not suggest that Claimant do his regular work because Claimant run into trouble in climbing ladders and scaffolding. CX 5; EX 19.

Dr. Paul Apostolo, a Board Certified Orthopedic Surgeon, conducted an Independent Medical Examination on October 30, 1996, EX 8. Claimant reported having difficulties with his right shoulder since about April 4, 1996 and his right knee since about April 24, 1996.² Claimant did not report any ongoing medical problems and did not take any medications. He had had two neck surgeries, right middle finger surgery, a left wrist arthrodesis, as well as an arthroscopy on his left knee. Claimant had also undergone a shoulder decompression with debridement of the subacromial bursa and acromioplasty by Dr. Friedler on July 30, 1994. Dr. Apostolo observed that Claimant did not have a rotator cuff tear, nor did he have a rotator cuff repair. Claimant reported a 1991 motor vehicle accident which jerked his neck and resulted in an additional award for his neck.

Claimant reported to Dr. Apostolo that his current symptoms included giving way and weakness in his right knee, clicking in the lateral aspect of the right knee, pain in his neck when turning it from side to side, a diminished quickness in motion with the neck, and soreness in the shoulder. Claimant stated that he attributed the pain in his neck to the April 4, 1996 incident. Additionally, Claimant stated that both his neck and shoulder were normal prior to the April 4, 1996 incident.

Dr. Apostolo reviewed Claimant's medical records, took x-rays of his neck and right shoulder, and conducted a physical examination. He concluded that the contusion in the right shoulder had resolved, that the right shoulder subacromial bursitis without rotator cuff tear was successfully treated by surgical decompression and debridement with no residual impairment or

²According to his deposition testimony, Dr. Apostolo asked Ambrose why the first report he found of a complaint of knee pain was on April 24, 1996 because it represented a discrepancy. See EX 8 and EX 24 at 13-16. Ambrose told Apostolo he complained of knee pain from the first, but the doctors seemed more concerned with his shoulder and neck. In his Response to the preliminary motion at page 4, counsel for the Claimant alleged that Ambrose's complaint at the emergency room included pain in the right knee. I cannot determine from the illegible copy in the record, EX 18, whether counsel is correct. I do not view this as significant, however, since none of the doctors who initially examined Ambrose mention any problems with his knee. Furthermore, Dr. Apostolo stated that neither falling to his knee during the accident, nor being struck on the knee, would cause the degenerative, as opposed to traumatic, damage to the knee documented in the record. EX 24 at 20-27.

disability, and that the Claimant had right knee degenerative arthritis unrelated to the described incident of April 4, 1996. Dr. Apostolo also concluded, if the Claimant's statements were correct that he had no shoulder discomfort before the accident, that there was a possibility the direct trauma of this nature could have started an inflammatory reaction in the subacromial bursa of the right shoulder. However, at the time of the exam, his shoulder was normal and the Claimant was capable of returning to all normal activities without limitations. He stated that he did not believe Ambrose injured his right knee at the time of the accident. Claimant's complaints of lateral knee discomfort were consistent with chronic degenerative changes. He concluded that Ambrose was capable of returning to all normal activities without limitation. Based on the examination, the knee did not require intervention, although he might eventually need arthroscopic surgery for osteoarthritis. His neck was also doing well considering his prior surgery. He required no further diagnostic or therapeutic intervention for his neck, and although it "may have been exacerbated by the described trauma but it was not aggravated and at this time I believe he has resumed his pre April 4, 1996 status with respect to his neck." EX 8 at 3.

In his next evaluation on December 12, 1996, Dr. Friedler noted that the Claimant still complained of discomfort in his neck and right knee. Dr. Friedler noted, however, that Claimant was doing well with his shoulder. He stated that Claimant's treatments and problems necessitated his inability to work and that Claimant was still unable to work. After a physical examination, Dr. Friedler concluded that Claimant needed surgery on his right knee. He stated that Claimant could only work in an office type of position. CX 4.

Dr. Friedler next examined Claimant on January 3, 1997. Dr. Friedler noted that Claimant's condition was unchanged. Claimant still experienced discomfort in his neck and right shoulder. Claimant's right knee was giving out and was swelled. Dr. Friedler reported that Claimant had difficulty climbing and standing and concluded that Claimant would not be able to resume working as a first class ship fitter. He stated that Claimant should have surgery on his right knee and that there was no guarantee that he would not continue to have problems with that knee. Dr. Friedler stated that Claimant would only be able to perform an office type position. CX 3.

Dr. Friedler was deposed on March 3, 1997. He testified about his qualifications, and examinations and treatment administered to Ambrose as set forth in the reports. His initial impression was prior cervical fusion with an acute exacerbation of symptoms due to trauma, contusion of the right shoulder with tendinitis and a possible lumbosacral strain. He thought it obvious Ambrose was unable to work. By April 24, Ambrose was having severe pain in his neck, and right shoulder, but his low back was not a problem. He also reported clicking in his right knee, which was not swollen. Over time, he said Ambrose's neck and shoulder improved, although he still had discomfort in his neck and some limitation of motion in the shoulder, but the knee grew worse. He recommended sedentary work because of the knee, and felt that Ambrose needed knee surgery because of the April 4, 1996 accident. On cross examination, he stated that the studies of Ambrose's neck showed what would be expected in a patient with Ambrose's history of surgery, the diagnostic studies did not show anything which could be attributed to the

April 1996 accident, and he could not tell what happened specifically from an incident of trauma. He agreed that Ambrose did not tear his rotator cuff, and that degenerative arthritis in his knee preexisted April 4, 1996. He could not say how much the accident caused progression of disease in the knee. CX 26; EX 23.

Dr. Apostolo was deposed on March 4, 1997. He testified about his qualifications, and how he conducted his examination of Ambrose. He testified that there is no relationship between Ambrose's knee symptoms and the events of April 4, 1996, because his symptoms are easily explained by degenerative arthritis; because there was no reported history of problems with the knee until after April 24; because Ambrose's story of a bruise over the knee, or falling onto his knee, even if true, would not cause wear and tear within the knee; and there was no evidence of knee trauma such as swelling in any of the examinations. He believed that Ambrose embellished his story. In his opinion, trauma to Ambrose's neck was purely muscular, because all neurological tests were normal. The injury to the shoulder was a contusion, as a result of which he developed inflammation. The shoulder surgery involved a small incision to muscle, and a chronic bone spur related to mild degenerative arthritis was removed. Although the operative notes clearly stated that there was no rotator cuff tear, Dr. Friedler's notes thereafter always referred to repair of the rotator cuff. Dr. Friedler's report of a tear in the bursa was unheard of and unexplainable. He testified that based on his review of the records, Ambrose would have been able to return to light-duty work the day after the accident. EX 24.

Dr. Friedler last examined Claimant on November 9, 1999. At this examination, Claimant complained of pain in the neck, upper shoulder area and right elbow, difficulty with motion in the right shoulder with loss of strength, headaches, and difficulties with the right knee. Dr. Friedler examined Claimant's neck, cervical spine, shoulders, lumbosacral spine, elbows, wrists, hands, and knees. He concluded that Claimant was a well nourished and developed male, who seemed uncomfortable when he gets ambulatory. Dr. Friedler's impressions were: (1) traumatic chondromalacia patella, right knee. Probable tear of medial meniscus with degenerative changes; (2) prior anterior and posterior fusion, C4-5, C5-6, and C6-7 with an acute exacerbation of symptoms secondary to trauma; and (3) contusion of right shoulder with tendinitis, bursitis, and subsequent decompression with bursectomy release of the coracoacromial ligament near acromioplasty. Dr. Friedler gave Claimant samples of Vioxx to try and prescribed Tums in between meals. He stated that if Claimant does not experience relief, then he will arrange a cortisone injection. Overall, Dr. Friedler stated that Claimant needs an arthroscopic evaluation of his right knee with any appropriate treatment to follow and that Claimant remained totally disabled. CX 2.

Dr. Apostolo conducted another independent medical examination on July 21, 2000. He reported that Claimant's complaints relating to the April 4, 1996 incident were right-sided headaches, soreness in his neck, occasional pain in the shoulder with overhead motion, and with respect to his right knee, pain along the medial joint line with occasional giving way 2 to 3 times per day. Upon examination of Claimant's neck, shoulder, and knee, Dr. Ambrose found that the Claimant had reached maximum medical improvement. Dr. Apostolo did not believe that

Claimant's difficulties with his head, neck, and right knee were related to incident on April 4, 1996. He stated that the Claimant had the following disability ratings: 15% overall impairment for the neck, with a 0% impairment rating for injuries relating to the incident; 3% total impairment to the right shoulder, with a 3% impairment rating for injuries relating to the incident; total overall impairment to the right knee is 7%, with a 0% impairment rating for injuries relating to the incident; and a 0% impairment rating of his head. Therefore, Dr. Apostolo concluded that, as a result of the incident on April 4, 1996, Claimant had a 3% impairment due to right shoulder which does not restrict the Claimant's ability to work. Moreover, Dr. Apostolo concluded that Claimant's overall disability due to his neck, shoulder, head, and knee (a total of 25%) is materially and substantially greater as a result of the contributions of his pre-existing conditions. EX 7.

Dr. Apostolo was deposed a second time on June 20, 2001. EX 37. He testified that both examinations of Ambrose took more than an hour, based on his notes and reports, including interviews, with the hands on physical examination taking less than ten minutes. Based on the results of the second examination, he considered the status of Ambrose's neck to be above average for someone with a multi-level fusion. His shoulder had excellent strength and range of motion, with only some limitation passing his arm behind his back. There were no appreciable differences in his neck and shoulder between the two examinations. Dr. Apostolo's opinion that Ambrose's problems with his right knee were degenerative arthritis unrelated to the April 1996 accident was unchanged. During the recent examination, there was no swelling and the examination of the right knee was normal for a 55 year old. He stated that discomfort along the medial joint line [remarked upon in Dr. Friedler's reports] is the most typical area for early arthritis to present. He stated specifically that "Mr. Ambrose is fully capable of returning to the work that he was performing prior to April 4th, 1996 with respect to any injuries that he may have received on April 4th, 1996." EX 37 at 28. He explained his impairment rating. He stated that shoulder surgery was the reason for assigning a 3% impairment rating of Ambrose's shoulder, but he was of the opinion that the impairment did not cause any disability to Ambrose. He reiterated his opinion that Ambrose sustained only soft tissue injuries in the accident, which had resolved by October 30, 1996. On cross examination he stated that Ambrose had limitations before the April 1996 accident, but was able to work, and that neither the condition of his neck, nor his knee, got any worse as a result of the April 1996 accident. He stated that the most significant observations in the operative report of Ambrose's shoulder surgery reflected inflammation of the bursa.

III. Discussion

I find no evidence that a mistake of fact was made when Judge Schreter-Murray determined that Ambrose suffered a soft tissue injury to his neck and shoulder in the April 1996 accident which had fully resolved by October 30, 1996, and that problems with his right knee were unrelated to the accident. Nor does the 3% impairment to Ambrose's shoulder as a result of the surgery assessed by Dr. Apostolo at the July 2000 examination constitute a change in condition. Dr. Apostolo specifically stated that the impairment did not affect Ambrose's ability to work at his previous job.

Dr. Friedler repeated the phrase in every report that Ambrose had a prior cervical fusion “with an acute exacerbation of symptoms secondary to trauma,” and in every report until the last the diagnoses of “Post repair torn rotator cuff right shoulder . . .” and “Contusion right knee with degenerative arthritis, probable torn medial meniscus.” He offered only conclusory statements, however, that there was any residual effect of the accident on Ambrose’s neck, shoulder or knee. There is no objective evidence supporting his conclusion that there was any injury to Ambrose’s knee in the accident which contributed to the condition of the knee thereafter. In his deposition, Dr. Friedler admitted that the studies of Ambrose’s neck showed what would be expected in a patient with Ambrose’s history of surgery, that the diagnostic studies did not show anything which could be attributed to the April 1996 accident, and that he could not tell what happened specifically from an incident of trauma. He also agreed that Ambrose did not tear his rotator cuff, and that degenerative arthritis in his knee preexisted April 4, 1996. He could not say how much the accident caused progression of disease in the knee. Furthermore, even he agreed that Ambrose’s neck and shoulder improved over time, but the knee grew worse. He recommended sedentary work because of the knee.

Dr. Apostolo, on the other hand, provided well-reasoned opinions consistent with the objective evidence and the evidence as a whole, that Ambrose suffered no disabling effects to his neck or his shoulder from the accident, that his problems with his knee were unrelated to the accident, and that his complaints were “embellished.” Dr. Apostolo’s opinion is supported by those of Dr. Dollete and Dr. Bailey, who treated Ambrose the day after the accident, and Dr. Folgueras and Dr. Wenzlaff, also board certified orthopedic surgeons, who examined Ambrose the following month. Dr. Dollete stated that Ambrose could return to modified duty the very next day. Both Drs. Folgueras and Wenzlaff diagnosed soft-tissue injuries to Ambrose’s upper body, and recommended anti-inflammatory medicine and return to light duty work as early as May 1996. As there was no residual impairment from the April 1996 accident affecting Ambrose’s ability to work at his job, I conclude that Ambrose is not entitled to benefits for permanent partial or permanent total disability as a result of the April 1996 accident.

ATTORNEY FEES

The award of an attorney’s fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the LHWCA, 33 U.S.C. § 928. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by Joseph Ambrose on September 11, 2000, is hereby DENIED.

A

Alice M. Craft
Administrative Law Judge